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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-388

BETTY L. GERACE and ALLEN J. GERACE,
Petitioners,

vs.

COUNTY OF LOS ANGELES, a legal subdivision of the State of California, CIVIL SERVICE COMMISSION of the County of Los Angeles, The Office of Sheriff of Los Angeles County, PETER J. PITCHESS, Sheriff,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

OPINIONS BELOW

The Court of Appeal opinion in this matter is attached to the Petition as Appendix "A," and the Order of the California Supreme Court denying a hearing is attached to the Petition as Appendix "B." A true and correct copy of the Findings of Fact and Conclusions of Law of the Civil Service Commission of the County of Los Angeles is set forth as Appendix "A" to this Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the admitted commission by local peace officers of acts proscribed as felonies and the failure to make any arrests in connection with such acts justifies the requirement that such officers account for their conduct.

2. Whether attempts to conceal misconduct by false statements in lieu of any assertion of rights against self-incrimination constitutes sufficient grounds for discharge of local peace officers.

STATUTES INVOLVED

The provisions of Sections 3120.70 and 3120.71 of the Manual of Policy and Ethics of the Los Angeles County Sheriff's Department are set forth as Appendix "B" to this Brief.

STATEMENT OF THE CASE

The content of the Sheriff's Department's questions to Petitioners; the actions of Petitioners leading to their discharges; and the chronology of events in the Civil Service Commission and Courts below are correctly set forth in the Petition.

In fact, Petitioners' acts and the conduct by the

Sheriff's Department of its administrative investigation cannot be in dispute, since both were entered into evidence in Civil Service Commission proceedings by stipulation of the parties.

Subsequent to full hearing on the merits, the Civil Service Commission rendered its Findings of Fact and Conclusions of Law, and its Order, which are set forth in full as Appendix "A" to this Brief. The Commission found that Petitioners had engaged in actions "proscribed" as felonies under California law, and that this fact, as well as the failure to make any arrests and the attempts to conceal these actions by false statements were inconsistent with the continuation of Petitioners' status as peace officers.

REASONS FOR DENYING THE WRIT

I

QUESTIONING OF PETITIONERS RELATED SPECIFICALLY, DIRECTLY AND NARROWLY TO PERFORMANCE OF THEIR OFFICIAL DUTIES, AND THEIR DISCHARGES WERE FOR THE BREACH OF SUCH DUTIES.

Throughout the course of this action, Respondents have relied upon the language from *Gardner v. Broderick*, 392 U.S. 273, 88 S. Ct. 1913 (1968), as quoted on page 18 of the Petition. The ultimate factual determination required in the instant matter by the criteria set forth in *Gardner* is whether the commission of acts proscribed as felonies under the California

Penal Code and the failure to make any arrests in connection with such acts bears a sufficient nexus to the official duties of a local peace officer.

It is important that the administrative investigation of Petitioners' activities began upon the basis of a citizen complaint concerning attempted extortion by a peace officer; it is certainly entirely reasonable in the investigation of such a complaint to inquire into the underlying facts, which in this instance involve the performance of an abortion upon Petitioner Betty L. Gerace.

Furthermore, Petitioners should not be heard to argue that their actions are protected because the abortion occurred during Petitioners' "off duty" hours. Although it is true that Petitioners were not on pay status during the activities in question, courts have generally been consistent in their observations that:

> "... Any rule that a peace officer only functions while on active duty would unnecessarily weaken the fabric of law enforcement." (*People v. Hooker*, 254 Cal. App. 2d 878, 883, 62 Cal. Rptr. 675 (1967)); Also see: *People v. Derby*, 177 Cal App. 2d 626, 630-631, 2 Cal. Rptr. 401 (1960); *People v. Townsend*, 20 Cal. App. 3d 688, 694-696 (1971); *Hammer v. Wells Fargo & Co. Express*, 174 App. Div. 724, 160 N.Y.S. 651.

Although Petitioners have occasionally argued that even as peace officers they had no duty to arrest each other for commission of the stipulated acts, Petitioners

have never provided this Court or any other court hearing the matter with adequate justification for failure to arrest the person performing the abortion. Thus, Petitioners' actions display a clear breach of their duties of arrest pursuant to California Government Code, Section 26601.

Even if it is assumed that the Provisions of California's Therapeutic Abortion Act (California Health and Safety Code, Sections 25950 et seq.), are in some manner constitutionally deficient, these provisions were nevertheless in full force and effect in January, 1969, when the abortion was performed. Law enforcement officers must not be allowed to obey and enforce only those laws which they find personally convenient, and then speculate upon the outcome of their actions. Such a result is not conducive to the maintenance of a society based upon a rule of law.

Implicit in Petitioners' arguments is the assumption that they were somehow subjected to prosecution of a "criminal" nature. In fact, it is clear that the questioning of Petitioners by their employer effectively granted them a complete immunity from the use of any of their answers or the fruits thereof in a subsequent criminal prosecution under the holding of this Court in *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967). Respondents have never argued otherwise and have consistently adopted the position that Petitioners' answers were of utility solely for the purpose of the administrative actions in question.

A requirement that Petitioners' employer, who was coincidentally a law enforcement officer, ignore the conduct demonstrated by Petitioners would:

> ". . . incur a risk of danger to the public which, at least as of this date, outweighs the competing considerations of a problematical gain in deterrence." (*In re Martinez*, 1 Cal. 3d 641, 650, 463 P. 2d 734, 83 Cal. Rptr. 382 (1970) cert. denied, 400 U.S. 851)

II

PETITIONERS WERE PROPERLY DISCHARGED FOR THE GIVING OF FALSE ANSWERS IN LIEU OF ASSERTION OF A PRIVILEGE AGAINST SELF-INCRIMINATION.

A separate and independent ground for the discharge of Petitioners was their attempt to conceal the nature of their actions by false statement concerning the location of the abortion (presumably upon the basis of their assumption that the performance of such an abortion in Mexico would have rendered it legal). Assuming that the questioning directed to Petitioners was in fact "specifically, directly and narrowly related to the performance of [their] official duties," Peitioners had the alternative of truthfully answering the propounded questions or asserting a right against self-incrimination and refusing to answer. The third alternative of attempting to falsify evidence was not legally permissible.

In *United States v. Knox,* 396 U.S. 77, 24 L. Ed. 2d 275, 90 S. Ct. 363 (1969) this Court rejected the contention that the Fifth Amendment gave the right to file a falsified tax return. In sustaining appellant's conviction, this Court noted:

> "In *Bryson v. United States,* 396 U.S. 64, 24 L. Ed. 2d 264, 90 S. Ct. 355 (1969), we reaffirmed the holding of *Dennis v. United States,* 384 U.S. 855, 16 L. Ed. 2d 973, 86 S. Ct. 1840 (1966), that one who furnishes false information to the government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself." (396 U.S. 77, 79)

Thus, Petitioners cannot be heard to challenge Sections 3120.70 and 3120.71 of the Sheriff's Manual of Policy and Ethics under the guise that these sections imposed unreasonable limitations upon Petitioners' actions.

Furthermore, it is submitted that Petitioners had a duty to give truthful answers that was independent of any statute or rule. This is supported by a statement in *Mackey v. United States,* 401 U.S. 667, 28 L. Ed. 2d 404, 91 S. Ct. 1160 (1971), where this Court noted that:

> ". . .[E]ven when the privilege against self-incrimination permits an individual to refuse to answer questions asked by the Government, if false answers are given the individual may be prose-

cuted for making false statements." (401 U.S. 667, 705)

In conclusion, it is submitted that the actions and policies of Respondents in this matter were entirely consistent with prior decisions of this Court; and that the restrictions placed upon Petitioners' scope of action during the administrative investigation were entirely reasonable and consistent with necessary attempts to insure the public trust essential for effective support of law enforcement. For these reasons, Respondents therefore respectfully request that the Petition for Certiorari be denied.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN D. MAHARG,
County Counsel

By LARRY A. CURTIS
Deputy County Counsel
Attorneys for Respondents

APPENDIX "A"

BEFORE THE CIVIL SERVICE COMMISSION
OF THE COUNTY OF LOS ANGELES

In the Matters of the Discharges of BETTY GERACE and ALLEN GERACE, County Employees and Appellants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for hearing before Thelma T. Mahoney and O. Richard Capen, members of the Civil Service Commission and duly appointed hearing officers, on November 20, and November 26, 1969, and the County of Los Angeles Sheriff's Department being represented by John D. Maharg, County Counsel and Larry A. Curtis, Deputy County Counsel; and the appellants being present and represented by LeMaire, Mohi, Morales, Dumas and Song and Edward Fraunce, their attorneys of record, and evidence being introduced both oral and documentary, and the Hearing Officers having considered the evidence and being duly advised in the premises now make the following

FINDINGS OF FACT AS TO APPELLANT ALLEN GERACE

1. It was stipulated that, Appellant Allen Gerace knew and approved of an abortion performed upon his wife during the latter part of January, 1969, and was present during the abortion, and Allen Gerace and his wife Betty Gerace jointly paid $700 for the abortion.

2. It was stipulated that, Appellant Allen Gerace with the knowledge of his wife, Betty Gerace, contacted a doctor and various other persons for the purpose of obtaining and securing information as to who would perform an abortion upon his wife, Betty Gerace.

3. It was stipulated that, Appellant Allen Gerace was interviewed by Sheriff's Department personnel on May 26, 1969 and May 29, 1969 concerning the above-indicated occurrences, and on May 29, 1969, Allen Gerace admitted that he had lied about the location of the abortion during the May 26, 1969 interview.

4. During all of the above-mentioned occurrences, Appellant Allen Gerace was employed as a peace officed by the Los Angeles County Sheriff's Department.

5. Appellant Allen Gerace was notified by letter dated August 5, 1969 that he was discharged from his position of Sergeant with the Los Angeles County Sheriff's Department effective at the close of business August 5, 1969; said notice was accomplished by personal service upon appellant Allen Gerace.

6. Appellant requested a hearing by letter dated August 11, 1969, which letter was received by the Civil Service Commission on August 11, 1969.

FINDINGS OF FACT AS TO APPELLANT BETTY GERACE

1. By stipulation of the parties, prior to January, 1969, Appellant Betty Gerace contacted various persons for the purpose of securing information as to persons who would perform an abortion upon her.

2. By stipulation of the parties, Appellant Betty Gerace allowed an abortion to be performed upon herself in the latter part of January, 1969, at her residence, and she and her husband, Appellant Allen Gerace, jointly paid $700 for the abortion.

3. It was stipulated that on May 26, 1969, Appellant Betty Gerace was interviewed by personnel of the Los Angeles County Sheriff's Department and "Deputy Gerace stated that the abortion was performed at her residence. The interviewers stated that they had pictures and implied that Sgt. Gerace had already told them that it was performed in Mexico. Then Deputy Gerace said it was performed in Mexico."

4. During all of the above-mentioned occurrences, Appellant Betty Gerace was employed as a peace officer by the Los Angeles County Sheriff's Department.

5. Appellant Betty Gerace was notified by letter

dated August 5, 1969 that she was discharged from her position with the Los Angeles County Sheriff's Department effective at the close of business August 5, 1969; said notice was accomplished by personal service upon Appellant Betty Gerace.

6. Appellant requested a hearing by letter dated August 11, 1969, which letter was received by the Civil Service Commission on August 11, 1969.

CONCLUSIONS OF LAW AS TO APPELLANT ALLEN GERACE

1. The appellant had violated Sections 3120.03 (Obedience to Laws, Regulations and Orders); 3120.70 (False Statements); and 3120.71 (Statements during departmental investigations), of the Manual of Policy and Ethics of the County of Los Angeles Sheriff's Department.

2. The actions of Appellant Allen Gerace in relation to the securing and performance of an abortion for and upon Appellant Betty Gerace as set forth in the above Findings of Fact are actions proscribed as felonies pursuant to Sections 182 and 276 of the California Penal Code.

3. The doing of acts proscribed as felonies by the California Penal Code as set forth above was a breach of the duties of Appellant Allen Gerace at any and all times, including off duty hours, and was further a breach of the duties of Appellant Allen Gerace as

set forth in California Government Code, Section 26601, in that Appellant Allen Gerace had the duty to place the individual performing the Abortion under arrest for the above acts, and, as a separate duty, had the duty to place Appellant Betty Gerace under arrest for the doing of the acts specified in the Findings of Fact as to Appellant Betty Gerace.

4. The conduct of Appellant Allen Gerace as set forth above is directly related to the performance of his duties as a peace officer, and renders him unfit for further service as a peace officer.

5. The doing by a peace officer of acts proscribed as felonies is *per se* inconsistent with the performance of his duties as a peace officer, and renders him unfit for further service as a peace officer.

6. The actions of Appellant Allen Gerace in committing acts proscribed as felonies and attempting to conceal the details of those acts by an untrue statement to Sheriff's Department investigators constitute a breach of the duties of Appellant Allen Gerace as a peace officer, and render him unfit for further service as a peace officer.

7. Any or all of the above Conclusions of Law as to Appellant Allen Gerace are sufficient to support the determination that the Los Angeles County Sheriff's Department be sustained in its discharge of Appellant Allen Gerace.

CONCLUSIONS OF LAW AS TO APPELLANT BETTY GERACE

1. The Appellant has violated Sections 3120.03 (Obedience to Laws, Regulations and Orders); 3120.70 (False Statements); and 3120.71 (Statements during departmental investigations), of the Manual of Policy and Ethics of the County of Los Angeles Sheriff's Department.

2. The actions of Appellant Betty Gerace in relation to the securing and performance of an abortion for and upon Appellant Betty Gerace as set forth in the above Findings of Fact are actions proscribed as felonies pursuant to Sections 182 and 275 of the California Penal Code.

3. The doing of acts proscribed as felonies by the California Penal Code as set forth above was a breach of the duties of Appellant Betty Gerace at any and all times, including off duty hours, and was further a breach of the duties of Appellant Betty Gerace as set forth in California Government Code, Section 26601, in that Appellant Betty Gerace had the duty to place the individual performing the abortion under arrest for the above acts, and, as a separate duty, had the duty to place Appellant Allen Gerace under arrest for the doing of the acts specified in the Findings of Fact as to Appellant Allen Gerace.

4. The conduct of Appellant Betty Gerace as set forth above is directly related to the performance of

her duties as a peace officer, and renders her unfit for further service as a peace officer.

5. The doing by a peace officer of acts proscribed as felonies is *per se* inconsistent with the performance of her duties as a peace officer, and renders her unfit for further service as a peace officer.

6. The actions of Appellant Betty Gerace in committing acts proscribed as felonies and attempting to conceal the details of those acts by untrue statement to Sheriff's Department investigators constitute a breach of the duties of Appellant Betty Gerace as a peace officer, and render her unfit for further service as a peace officer.

7. Any or all of the above Conclusions of Law as to Appellant Betty Gerace are sufficient to support the determination that the Los Angeles County Sheriff's Department be sustained in its discharge of Appellant Betty Gerace.

WHEREFORE, the action of the Department in discharging the said employees and appellants Allen Gerace and Betty Gerace should be sustained and the same employees discharged from their same said position.

DATED this 11 day of March, 1970.

THELMA T. MAHONEY
O. RICHARD CAPEN

BEFORE THE CIVIL SERVICE COMMISSION
OF THE COUNTY OF LOS ANGELES

In the Matters of the Discharges of BETTY GERACE and ALLEN GERACE,	)
County Employees and Appellants.	)

FINDINGS, CONCLUSIONS AND ORDER OF THE CIVIL SERVICE COMMISSION

The Civil Service Commission of the County of Los Angeles, having read the foregoing Findings and Conclusions, and good cause appearing therefor, and the Commission being duly advised in the matter, accepts the Findings and Conclusions of its duly appointed hearing officer Thelma T. Mahoney, and hereby orders that the appeal of Betty Gerace and Allen Gerace be denied.

DATED: this 11 day of March, 1970.

THELMA T. MAHONEY,
President

O. RICHARD CAPEN,
Member

EMMET M. SULLIVAN,
Member

APPENDIX "B"

STATUTES INVOLVED

Manual of Policy and Ethics of the County of Los Angeles Department of Sheriff:

§ 3120.70 *False Statements.* Members shall not make false statements when questioned or interviewed or in reports submitted.

§ 3120.71 *Statements During Departmental Investigations.* If requested to make a statement in the course of an official Departmental investigation, members shall make full, complete, and truthful statements.